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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 67.

JOHN W. TERRY, *et al.*,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

BRIEF FOR RESPONDENT

In Opposition to a Petition for a Writ of Certiorari To the Court of Appeals of Cuyahoga County, Ohio.

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BRIEF FOR RESPONDENT

In Opposition to a Petition for a Writ of Certiorari To the Court of Appeals of Cuyahoga County, Ohio.

PRELIMINARY STATEMENT.

Every state legislative enactment dealing with the regulation of human conduct is a potential cause of inconvenience and petty indignity. This is the price we pay for being free men and for being able to live in an orderly, civilized democratic society. That price is measured in terms of the restrictions of human conduct as enunciated by the laws of the Land and the states.

Many Amici have passed before the Court in argument of this matter. Their arguments contain civil rights inferences, and problems related thereto, mixed marriages and the complications they present. The gist of their arguments is that the right of personal security, the personal liberties and the private properties of free men will be forfeited if the case at bar is affirmed.

The problem presented has no immediate relation to any of these arguments. Nor will any of the constitutional safeguards pertaining to individual liberty be forfeited by an affirmance of the appellate court's decision.

The formulation of standards of criminal due process consistent with the imperatives of individual liberty in an orderly civilized society is as much the concern of the State and its citizens as a whole as it is of these petitioners, the American Civil Liberties Union, and the other interested Amici.

With this thought the respondent is interested in guideposts in this virtually endless series of vexing legal questions as to the rights of the individual and the right of our civilized, orderly democratic society to continue to take necessary steps (in the formulating of rules and laws) for the preservation of its existence.

What the instant case does involve is the right of a police officer (society's agent) to make an on-the-street stop, interrogate and pat down for weapons (known in street vernacular as "stop and frisk.")

This vexing legal question presents its difficulty not in how far the Court should travel along the road but in deciding what road should be taken.

It is in the expectation that the Court, in performing its delicate task in the instant case, will balance the equities of the individual petitioners in protecting their right to privacy against the equities of our civilized, orderly democratic society and its need for workable rules to use in the repression of ever-increasing crime, that respondent urges affirmance.

STATEMENT OF THE CASE.

John W. Terry and Richard D. Chilton (the latter now deceased), the petitioners, were indicted on a charge of carrying concealed weapons, in violation of Section 2923.01 of the Revised Code of Ohio. The trial court overruled a pretrial motion to suppress evidence (guns) and, upon a plea of not guilty, the court, sitting without a jury, returned a verdict of guilty as to both Terry and Chilton.

The relevant facts are as follows: At approximately 2:30 p.m. on October 31, 1963, a Cleveland detective with 39 years and 4 months' police experience observed two men, later identified as John W. Terry and Richard D. Chilton, on the corner of East 14th Street, Huron Road and Euclid Avenue (in downtown Cleveland), engaging in behavior that immediately attracted his attention and aroused his suspicions. Positioning himself across the street he observed these men for approximately ten to twelve minutes. One man remained at the corner, the other walked several hundred feet up the street, peered into the window of either a diamond store or an airline office and then returned to the corner to converse with the other. The other man in turn would leave the corner, repeat the same pattern of conduct and return to the corner. This behavior pattern was repeated at least two to five times by each man. During this period, a third man, later identified as Carl Katz, approached the corner, spoke briefly with the two men, departed and stationed himself across the street. The two men resumed their pattern of conduct, each making four to six more trips. The two men then walked west on Euclid Avenue to 1120 Euclid Avenue where they encountered the third man who had spoken with them previously and who was positioned there. The detective testified: "* * * I didn't like their

actions on Huron Road, and I suspected them of casing a job, a stick-up * * *" (R. 42).

With this belief in mind, the detective approached the three men, who then were engaged in conversation, identified himself as a police officer, and asked for their names. Receiving only a mumbled, incoherent response (R. 26-27-28), the officer took hold of one (later identified as Terry), and turned him around in front of the officer facing the other two. He then patted Terry, the man in front of him. At no time did his hands reach into any pockets (R. 29-30). In patting Terry the officer felt the butt of a gun in the upper left pocket of the topcoat (R. 29). He inserted his hand under the coat and felt the handle of a gun. At this point the detective ordered the three men from the street to the interior of a nearby store. Retaining Terry by the collar of his coat he ordered all three to face the wall and place the palms of their hands against the wall. The detective then pulled Terry's coat by the collar, from the rear, removing the coat from Terry's shoulders. Exposed in the upper left inside coat pocket was a concealed revolver. The detective removed this gun (R. 185). Subsequent examination proved it to be loaded. The officer proceeded to pat down the second man, Chilton, on the outside of his clothing. He then felt an object in the left o[illegible] coat pocket which felt like a gun. He inserted his hand and removed a fully loaded revolver. A similar "patting down" of Katz revealed nothing. The three men were then taken to the police station where Terry and Chilton were charged with carrying concealed weapons.

ARGUMENT.

The instant case presents for review an example of the principle enunciated by this Court in *Ker v. California*, 374 U. S. 23, 34 (1963):

> "The states are not thereby precluded from developing workable rules governing arrest, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See Jones v. U. S., 362 U. S. 257 (1960).
>
> "Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only recognition that conditions and circumstances vary just as do investigative and enforcement techniques."

The questions presented in the brief of the petitioners assume facts and conclusions which the record does not support. The respondent urges that this case presents the following propositions:

1. A police officer has the right to stop a person engaged in suspicious behavior, in the absence of probable cause for arrest, for the purpose of interrogation. Such action is not violative of the Constitution of the United States.

2. Having stopped such person, based on observation of unusual behavior but without adequate grounds for arrest, the officer has the right to "frisk" for weapons for the protection of his own safety. Such conduct is a standard set by the State of Ohio. It is not violative of the Fourth Amendment of the Constitution of the United States.

3. "Stop and frisk" is differentiated from search and seizure in that the quantum of facts required to establish probable cause to "stop and frisk" is less than the quantum of facts required to establish probable cause to arrest and search.

4. In the case at bar the lawful "frisk" produced additional evidentiary facts which gave rise to probable cause to arrest petitioners for committing a felony in the presence of the officer.

5. In the case at bar there was a lawful arrest without a warrant for the commission of a felony and a legal search incident to the arrest; therefore evidence obtained in such search was admissible at the trial.

These contentions will be considered in sequence.

I. In the stated circumstances a police officer may stop and interrogate a person.

The Court of Appeals in its opinion affirming the conviction in the case at bar has adequately framed the first question. (*State v. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114.)

> **"The ambiguous nature of the word 'arrest,' and the issue of the right of the police to stop a person in a public street and question him under circumstances that would reasonably call for investigation and inquiry * * * consequently, the initial question to be resolved is the authority of the detective in the circumstances shown here, to stop and question the defendant. The validity of the subsequent police action and the determination of whether the detective had adequate grounds to make the arrest will hinge, in part, on the propriety of the initial inquiry."**

"The right of the proper authorities to stop and question persons in suspicious circumstances has its roots in early English practice where it was approved by the courts and the common-law commentators. See: 2 Hawkins, Pleas of the Crown (6th Ed. 1777) 122, 129; 2 Hale, Pleas of the Crown (Amer. Ed. 1847) 89, 96-97; Lawrence v. Hedger (Common Pleas 1810) 3 Taunt. 14, 128 Eng. Rep. 6. Today, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute. E.g., New York Code of Criminal Procedure (L. 1964, Chapter 86, Section 180-a); General Laws of Rhode Island (1956), Section 12-7-1; New Hampshire Revised Statutes (1955), Chapter 594, Section 2; 11 Delaware Code (1953), Section 1902; Warner, "The Uniform Arrest Act," 28 Virginia Law Review (1942) 315; Massachusetts General Laws (1961), Chapter 41, Section 98. In others, the right is recognized by court decisions. E.g., People v. Rivera (1964), 14 N. Y. 2d 441, 252 N. Y. S. 2d 458, 201 N. E. 2d 32; Gisske v. Sanders (1908), 9 Cal. App. 13, 98 P. 43; People v. Martin (1956), 46 Cal. 2d 106, 293 P. 2d 52; People v. Jones (1959), 176 Cal. App. 2d 265, 1 Cal. R. 210; and People v. Faginkrantz (1961), 21 Ill. 2d 75, 171 N. E. 2d 5."

In *Ker v. California*, 374 U. S. 23 (1963), the Court has stated that the states are not precluded from developing workable rules governing arrest, searches and seizures, to meet "the practical demands of effective criminal investigation and law enforcement," provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that the evidence so seized is inadmissible against one who has standing to complain.

The development of workable rules governing arrest, searches and seizures and stopping a person in a public street and questioning him under circumstances that

would reasonably call for investigation and inquiry is a legitimate exercise of the police power [1] of the State and does not contravene any constitutional provisions.[2]

Police power is not brought into existence by the constitution or by the legislature.[3] It is a power inherent in the existence of government.[4] It is the power of self protection and has its origin, purpose and scope in the general welfare, or as maintained here, the public safety.[5] The police power is asserted to protect the well-being of society and maintain the security of the social order.[6] It is invoked by the courts to sustain rules and regulations passed to provide for the public safety or welfare [7] and which do not contravene any constitutional provisions.[8] The object of the exercise of the police power is the promotion of the public good. 10 *O. J.* 2nd, Constitutional Law, Section 325, page 403.

The police power is the right of self preservation and self protection on the part of the community and its

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[1] *State v. Dilley*, 49 N. J. 460 (1967), 231 A. 2d 353, 357.

[2] *Chicago & N. W. R. Co. v. Illinois Commerce Com.*, 326 Ill. 625, 158 N. E. 376, 55 A. L. R. 654.

[3] *Franklin County v. Public Utilities Com.*, 107 Ohio St. 442, 140 N. E. 87, 30 A. L. R. 429; *Colletti v. State*, 12 Ohio App. 104, 31 Ohio C. A. 81, err overr 17 Ohio L. Rep. 364, 64 W. L. Bull. 462.

The police power of the state is not derived from the constitution of the United States, but is a power existing in them as sovereign states. *Armour & Company v. Augusta*, 134 Ga. 178, 67 S. E. 417.

[4] *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469; *Lakeshore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 S. Ct. 565.

[5] *Re Rameriz*, 193 Cal. 633, 226 P. 914, 34 A. L. R. 51; *Vermont Salvage Corp. v. St. Johnsbury*, 113 Vt. 341, 34 A. 2d 188.

[6] *State v. Powell*, 58 Ohio St. 324, 50 N. E. 900; *Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43.

[7] *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 991; *People v. Dehn*, 190 Mich. 122, 155 N. W. 744.

[8] See Note No. 2 *supra*.

exercise is justified by the necessity of the occasion. *State v. Boone,* 84 Ohio St. 346, 95 N. E. 924.

The measure of the police power is a measure of the public need.[9] It is described as the law of necessity[10] and always one of the least limitable[11] of the powers of government. It is that full final power that is involved in the administration of law as a means to the administration of practical justice.[12]

The term "police power" is not found in the Federal constitution or in the Ohio constitution.[13] It is a judicial invention. Because of its great dimensions and because it alters to keep pace with the times, courts wisely have not attempted to define it with exactness or precision.[14] Each individual case must stand upon its own footing. To approach some definition of it in relation to the case before

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[9] *State v. Henry,* 37 N. M. 536, 25 P. 2d 204, 90 A. L. R. 805.

To be a legitimate exercise of the police power, a statute must be reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm. *State v. Ballance,* 229 N. C. 764, 51 S. E. 2d 731, 7 A. L. R. 2d 407.

[10] *Re Yun Quong,* 159 Cal. 508, 114 P. 835; *Randall v. Patch,* 118 Me. 303, 108 A. 97, 8 A. L. R. 65.

[11] *Queenside Hills Realty Co. v. Saxl,* 328 U. S. 80, 90 L. ed. 1096, 66 S. Ct. 850.

[12] *Wessell v. Timberlake,* 95 Ohio St. 21, 116 N. E. 43.

The police power is nothing more or less than the powers of government inherent in every Sovereignty to the extent of its dominions. *A. F. L. v. American Sash & Door Co.,* 67 Ariz. 20, 189 P. 2d 912, Affd. 335 U. S. 538, 93 L. ed. 222, 69 S. Ct. 258, 6 A. L. R. 2d 481

[13] See note No. 3 *supra.*

[14] *Colletti v. State,* 12 Ohio App. 104.

An attempt to define the reach of the police power or to trace its outer limits is fruitless; each case must turn on its own facts. *Berman v. Parker,* 348 U. S. 26, 99 L. ed. 27, 75 S. Ct. 98.

Definitions of police power which give its boundaries with precision have not been attempted by any courts. It is wise that it is so, because this, like many of the subject matters of the law, is constantly in the process of evolution and development, and must be adapted to the social, industrial, and commercial conditions of the times. *Wessell v. Timberlake,* 95 Ohio St. 21, 116 N. E. 43.

the bar we consider it as that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its safety, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires.[15]

Considering the increase in crime, and the boldness of today's criminal and his use of every modern technical device, modern society requires the exercise for the public good of the right of officers to stop persons who are engaged in suspicious activity on the streets.

Certainly the police power is circumscribed by the express limitation of the state and federal constitutions.[16]

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[15] *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330.

[16] *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 96 L. ed. 469, 72 S. Ct. 407, reh. den. 343 U. S. 921, 96 L. ed. 1334, 72 S. Ct. 674. The various exercises by the states of their police power stand on an equal footing, all being entitled to the same presumption of validity when challenged under the due process clause of the Fourteenth Amendment, and all being of equal dignity when measured against the commerce clause. *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520, 3 L. ed. 2d 1003, 79 S. Ct. 962.

The states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs so long as their laws do not run afoul of some specific federal constitutional provision, or of some valid federal law. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 93 L. ed. 212, 69 S. Ct. 251, 6 A. L. R. 2d 473.

While the police power is very broad, it is bound by constitutional limitations and cannot properly be exercised beyond such reasonable interferences with the liberty of action of individuals as are really necessary to preserve and protect the public health, safety, and welfare. *Corneal v. State Plant Board* (Fla.), 95 So. 2d 1, 70 A. L. R. 2d 845.

The police power is an attribute of sovereignty and a function that cannot be surrendered. It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution. *Shea v. Olson*, 185 Wash. 143, 53 P. 2d 615, 111 A. L. R. 998, affd. on reh. 186 Wash. 700, 59 P. 2d 1183, 111 A. L. R. 1011.

It does, however, include anything which is reasonable, necessary and appropriate to secure the peace, order, protection, safety, welfare, and best interests of the public.[17]

There can be no question that the constitutional requirement of due process of law is a limitation upon the police power.[18] It may be the only real specific limitation[19] and is certainly the most important for purposes of this case if the limits of reasonableness are regarded as founded on the requirement of due process.

A reasonable exercise of the police power does not constitute a violation of due process.[20] The guarantee of due process in the exercise of police power demands only that the law shall not be unreasonable,[21] arbitrary or capricious,[22] and that the means selected shall have a real

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[17] See note No. 5 *supra.*

[18] *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A. L. R. 1016; *State v. Creamer,* 85 Ohio St. 349, 97 N. E. 602; *Mirick v. Gims,* 79 Ohio St. 174, 86 N. E. 880; *Colletti v. State,* 12 O. App. 104.

The police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguarding of the public interests. *Steinberg-Baum & Co. v. Countryman,* 247 Iowa 923, 77 N. W. 2d 15.

[19] *Baton Rouge v. Rebowe,* 226 La. 186, 75 So. 2d 239.

The test of a police regulation when measured by the due process clause of the constitution is reasonableness as distinguished from arbitrary or capricious action. *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156, 117 P. 1101.

The requirement of reasonableness is but a manifestation of the due process requirement, see *Hoff v. State,* 39 Del. 134, 197 A. 75.

[20] See note No. 2 *supra.*

[21] *Nashville, C. & St. L. R. Co. v. Walters,* 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; *Re Steube,* 91 Ohio St. 135, 110 N. E. 250.

[22] *People v. Griswold,* 213 N. Y. 92, 106 N. E. 929.

and substantial relation to the object sought to be attained.[23]

Due process of law does not forbid the sovereign to legislate to affect a class by description [24] (persons reasonably suspected of having committed or about to commit a crime) or to embrace the entire population,[25] the only requirement being that there shall be some reasonable basis and that the law shall operate equally.[26]

Government is based upon the proposition that certain inherent natural rights of the individual must be surrendered for the common good of all. If this principle were not applied, our government and our orderly society could not exist. Accordingly, regulations or conduct engaged in by virtue of the police power generally are confined to limitations upon or abrogations of constitutionally guaranteed rights. Most of the constitutional guarantees are subject to the police power of the state and may be regulated in the interest of the welfare and safety of the people. The state and federal constitutional provisions protecting personal liberties do not prohibit such regulations. They merely condition the exercise of the admitted power by securing that the end shall be accomplished by methods consistent with due process. Personal rights must yield in the public interest to the valid exercise of the police power of the state. Liberty does not import an absolute right to be at all times and in all circumstances

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[23] *Sandstrom v. California Horse Racing Board,* 31 Cal. 2d 401, 189 P. 2d 17, 3 A. L. R. 2d 90, Cert. den. 335 U. S. 814, 93 L. ed. 369, 69 S. Ct. 31.

[24] *State ex rel. Schneider v. Gullatt Cleaning and Laundry,* 32 O. N. P. N. S. 121.

[25] *Aetna F. Ins. Co. v. Jones,* 78 S. C. 445, 59 S. E. 148.

[26] *Standard Oil Co. v. Marysville,* 279 U. S. 582, 73 L. ed. 856, 49 S. Ct. 430; *Davis v. State,* 26 Ohio App. 340, 159 N. E. 575, affd. 118 Ohio St. 25, 160 N. E. 473, error dismd. 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432.

wholly freed from restraint. There are many restraints to which every person is necessarily subject for the common good.[27] This Court has held that a reasonable abridgement of the constitutional guarantees will be sustained under the police power.[28]

This Court, however, has never squarely decided whether the police may constitutionally stop and question a suspect without his consent in the absence of adequate grounds for arrest. However, the lower federal courts permit such field interrogations. See, *Henry v. United States,* 361 U. S. 98, 106 (1959) (Clark, J. dissenting); *Brinegar v. U. S.,* 338 U. S. 160, 178 (1949) (Burton, J. concurring); *Keiningham v. United States,* 307 F. (2d) 632 (D. C. Cir. 1962), cert. den. 371 U. S. 948 (1963); *Busby v. United States,* 296 F. (2d) 328 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962). The cases also indicate that an officer may stop and question even though he has insufficient grounds to make an arrest. See *Ellis vs. United States,* 264 F. (2d) 372 (D. C. Cir.), cert. den. 359 U. S. 998 (1959); *United States vs. Bonnano,* 180 F. Supp. 71, 78 (S. D. N. Y. 1960), rev'd on other grounds sub nom., *U. S. vs. Buffalino,* 285 F. (2d) 408 (2d Cir. 1960), cited with approval in *U. S. vs. Vita,* 294 F. (2d) 524, 530 (2d Cir. 1961).

As stated in the opinion of the Court of Appeals:

> "Admittedly there is some division of authority on the legality of the right to stop and question; however, the better view seems to be that the stopping and questioning of suspicious persons is not prohibited by the constitution. See, Note, 50 Cornell L. Q. 529, 533 (1965); United States vs. Vita, 294 F. (2d) 524 (2d

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[27] *Benjamin v. Columbus,* 167 Ohio St. 103, 146 N. E. 2d 854, Cert. den. 357 U. S. 904, 2 L. ed. 2d 1155, 78 S. Ct. 1147.

[28] See 16 *Am. Jusp.* 2d Const. L. Sec. 287, 307, P. 556, 602.

Cir. 1961), cert. den. 369 U. S. 823 (1962). Of great persuasive authority do we consider the long line of California cases, decided under the rule of People vs. Cahan, 44 Cal. (2d) 434 (1955), 282 P. 2d 905, in which this practice has been upheld. E.g., People vs. Martin, 46 Cal. (2d) 106 (1956), 293 P. 2d 52; People vs. Simon, 45 Cal. (2d) 645 (1955), 290 P. 2d 531; People vs. Jones, 176 Cal. App. (2d) 265 (1959), 1 Cal. Rep. 210. Also of great persuasive authority is the recent New York Court of Appeals decision in People vs. Rivera, 14 N. Y. (2d) 441 (1964), 201 N. E. 2d 32, wherein this practice was also upheld. The courts of Ohio do not appear to have been squarely presented with this problem before. Therefore, we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.

"An individual who acts in a suspicious manner invites a preliminary inquiry by the proper authority. It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry. See, Traynor, 'Mapp vs. Ohio at Large in the Fifty States,' 1962 Duke Law Journal 319 (1962). Such a minor interference with personal liberty would 'touch the right of privacy only to serve it well.' Traynor, supra at p. 334. If such questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. The business of the police is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible. As stated by the New York Court of Appeals in the recent case of People vs. Rivera (1964), 14 N. Y. 2d 441, at p. 444, 201 N. E. 2d 32:

'The authority of the police to stop defendant and question him in the circumstances is perfectly clear. * * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of the city police to be alert to things going wrong in the streets; if they were denied the right to such summary inquiry, a normal power and a necessary duty would be closed off.'

"Admittedly, this power to inquire may be abused. But the possibility of some future infraction should not require that the police should now be made powerless to make reasonable inquiries into suspicious behavior. If such abuses arise, we shall deal with them when the time comes. However, for the present, we hold that under the facts of this case, the detective's inquiry was reasonable under the conditions presented."

It is well settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for the purpose of limited inquiry in the course of routine police investigation. *Rios v. U. S.*, 364 U. S. 253, 80 S. Ct. 1431, 4 L. ed. 2d 1688 (1960); *Busby vs. U. S.*, 296 Fed. (2d) 328 (9th Cir. 1961).

The local policeman, in addition to having a duty to enforce the criminal laws of his jurisdiction, is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for suspicious circumstances, and provided that he acts within constitutional limits, to investigate whenever such circumstances indicate to him that he should do so. *Frye vs. U. S.*, 315 Fed. 2d 491, 494 (9th Cir. 1963).

Due regard for the practical necessities of effective law enforcement requires that the validity of brief informal detention be recognized whenever it appears from

the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the courts can determine that detention was not arbitrary or harassing. *Wilson vs. Porter,* 361 Fed. 2d 412, 415 (9th Cir. 1966).

Reasonable investigatory techniques may be pursued by police indoors as well as outdoors and it is not unusual for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. *People vs. Machel,* 44 Cal. Rpts. 126. Generally, police officers may detain and question persons when the circumstances are such as would indicate to a reasonable man in like position that such course is necessary to proper discharge of duty. *People vs. Machel,* 44 Cal. Rpts. 126,

II. The right of the officer to "frisk."

Having stopped such person, based on observation of unusual behavior but without adequate grounds for arrest, the officer has the right to "frisk" for weapons for the protection of his own safety. Such conduct is a standard set by the State of Ohio. It is not violative of the Fourth Amendment of the Constitution of the United States.

The petitioners argue that any "frisk" is a search in the full meaning of the term. The "frisk" as it evolved in the events that actually occurred in this case, and as it is generally understood in police usage, is a contact or patting of the outer clothing of a person to detect by the sense of touch whether a concealed weapon is being carried.[29] The frisk is without question less such an invasion

[29] *People v. Rivera,* 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. den. 379 U. S. 978. See also *People v. Koelzer,* 222 C. A. 2d 20, 34 Cal. Reptr. 718 (1963).

of the person in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person. This is exactly the distinction the trial judge made in rendering his opinion, affirmed by the Court of Appeals and review refused by the Ohio Supreme Court.

The test to be applied in determining whether the frisk is reasonable, as a valid exercise of the police power and in keeping with the Ker pronouncement (*Ker vs. California,* 374 U. S. 23 (1963)) that the states may develop workable rules to meet the practical demands of effective criminal investigation and law enforcement, is the same test used in determining the reasonableness of a search and seizure: Whether the thing done in sum of its form, scope, nature, incidents and effects impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered against the private right affected. *State vs. Hagan,* 137 N. W. 2d 895; *U. S. vs. Cook* (D. C. E. D. Tenn. 1962), 213 Fed. Supp. 568; *Schwimmer vs. U. S.* (C. A. 8th Dist. 1956), 232 Fed. 2d 855, cert. den. 352 U. S. 833, 77 S. Ct. 48, 1 L. ed. 2d 52.

Persons found under suspicious circumstances are not clothed with a right of privacy which prevents police officers from inquiring as to their identity and actions. The *essential needs of public safety* permit police officers to use their *faculties of observation and to act thereon within proper limits* (our emphasis). *State vs. Herdman,* 130 N. W. 2d 628.

The right of the police to investigate gives rise to the right to conduct a reasonable search for weapons in order to protect safety of officers. *People vs. Garrett,* 47 Cal. Rep. 731 (1966).

If we recognize the authority of the police to stop an individual and inquire concerning unusual street events (*U. S. vs. Vita*, 294 Fed. 2d 524, 530; *People vs. Marendi*, 213 N. Y. 600, 609; in a similar direction *U. S. vs. Bonanno*, 180 F. Supp. 71, 81, 83, which, although reversed on other grounds sub nom., *U. S. vs. Buffalino*, 285 F. 2d 410, was cited on this point with approval in *Vita* at page 530), we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger and the safety and welfare of the officer (the public interest) could be very great. The frisk for weapons is a reasonable and constitutionally permissible precaution to minimize that danger in the interest of safety and welfare. We ought not in deciding what is reasonable close our eyes to the actualities of street dangers encountered in performing this kind of public duty.[30]

This question can best be summed up by quoting that pertinent part of the Ohio Court of Appeals opinion regarding frisk:

> "Having determined that the police officer could validly inquire into the activities of the defendant, then it follows that the officer ought to be allowed to 'frisk,' under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril.

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[30] Police experience amply proves the need to search. For example, *Barbee v. Warden*, 331 F. 2d 842 (1964), records the misfortune of an officer who failed to make an adequate search. When the officer took his prisoner to a callbox, the man drew a gun, shot the officer, and fled.

Failure to make a proper search is said to be a circumstance in 19 percent of the cases in which police officers are shot. Police Officer Shootings—A Tactical Evaluation, *The Journal of Criminal Law, Criminology and Police Science*, March 1963.

See, Remington, 'The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General,' 51 Journal of Criminal Law, Criminology and Police Science 386, 891 (1960). What is the officer to do in this situation? Are we to allow him the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet? The practice of 'frisking' is well accepted in police practice, and police officers seem unanimous in stating that 'frisking' is done for self-protection and not as a mere evidentiary 'fishing expedition.' See: 'Philadelphia Police Practice and the Law of Arrest,' 100 University of Pennsylvania Law Review 1182 (1952); Leagre, 'The Fourth Amendment and the Law of Arrest,' 54 Journal of Criminal Law, Criminology and Police Science, 393 (1963). The Uniform Arrest Act and the state statutes which provide for questioning of suspicious persons specifically allow for the 'frisking,' of a suspect. See, Warner, 'The Uniform Arrest Act,' 28 Virginia Law Review 315 (1942); General Laws of Rhode Island, Section 12-7-2 (1956); New Hampshire Revised Statutes, Chapter 594, Sec. 3 (1955); 11 Delaware Code, Sec. 1903 (1953); New York Code of Criminal Procedure (L. 1964), Chapter 86, Section 180-a. In other states the right is recognized by court decision. See, People vs. Rivera, 14 N. Y. (2d) 441 (1964); People vs. Martin, 46 Cal. (2d) 106 (1956); People vs. Simon, 45 Cal. (2d) 645 (1955); People vs. Jones, 176 Cal. App. (2d) 265 (1959).

"In the instant case this officer of thirty-nine years' experience reasonably suspected that the defendant was 'casing' a store with robbery in mind. It was also logical for this experienced detective to presume that the defendant was armed and dangerous. As stated in the record:

> Q. Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him?

A. Due to my observation, the observation on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun.

"However, we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment and probable cause is essential. White vs. United States, 271 F. 2d 829 (C. C. A. D. C. 1959). Therefore, we hold only that on the facts presented in the instant case, the 'frisk' for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts."

III. "Stop and frisk" is differentiated from search and seizure in that the quantum of facts required to establish probable cause to "stop and frisk" is less than the quantum of facts required to establish probable cause to arrest and search.

While the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, there is a difference between "that cause" which will justify informal detention short of arrest and the probable cause standard required to justify that kind of custody traditionally denominated an arrest. *Wilson vs. Porter*, 361 Fed. 2d 412, 415 (9th Cir. 1966).

In dealing with probable cause, however, as the very name applies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar v. United States*, 338 U. S.

160, 93 L. ed. 1879, 69 S. Ct. 1002; *State v. Mark*, 46 N. J. 262, 271, 216 A. 2d 377 (1966); *State v. Dilley*, 49 N. J. 460, 231 A. 2d 353 (1967).

While the rule permitting temporary detention for questioning is operative under circumstances short of probable cause to make an arrest, there must exist some suspicious or unusual circumstances to authorize even this limited invasion of citizens' privacy. *People vs. Machel*, 44 Cal. Rpts. 126.

The rule that circumstances short of probable cause to make an arrest may still justify an officer stopping pedestrians, motorists, or others on the street; for questioning does not conflict with the United States Constitution Fourth Amendment forbidding unreasonable searches and seizures, but strikes a balance between a person's immunity from police interference and the community interest in law enforcement, and wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified. *People vs. Michelson*, 59 Cal. Rep. 2d 448 (1963).

In addition to the pragmatic and factual distinction that is made in the case at bar between "stop and frisk" and a lawful arrest with subsequent search and seizure, these acts are distinguishable from the standpoint of the decisions of the courts in the various states on the quantum of probable cause that is necessary as to each. What constitutes sufficient probable cause in a stop and frisk situation is no more subject to a hard and fast rule than is the probable cause for an arrest and subsequent search and seizure. It is for the trial court to say in the first instance, after hearing the facts, whether there is sufficient probable cause. Each case must stand on its own merits.

This is precisely what the trial court did in the instant case. (*State v. Chilton*, 95 Ohio Law Abs. 321, 323, 324, 32 O. O. 2d 489.)

> "At the same time a police officer cannot, as far as this court is concerned—and will not be permitted to—stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless there are reasonable circumstances justifying a frisk. This court believes there is a distinction between stopping and frisking and search and seizure. A search is primarily for the purpose of trying to obtain evidence in connection with the commission of a crime that the police officer may reasonably believe has been committed or might be committed. A frisk is strictly for the protection of the officer's person and his life."

The court concluded there was

> "reasonable cause for the officer * * * to approach these individuals and pat them. He approached them and for his own protection frisked them. He did not go into their pockets * * *. But police officers in a community also have rights under the constitution and rights given to them by virtue of their office, and one of those rights as I have indicated is the right *when the circumstances justify and there is a reasonable suspicion,* and *for his own personal protection,* to stop the individual or individuals and not search but to frisk, to determine if there are weapons for *his own personal safety* * * * without a warrant." (Our emphasis.)

While the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, there is a difference between that cause which will justify informal detention short of arrest and the probable cause required to justify that kind of custody traditionally designated an arrest. *Wilson vs.*

Porter, 361 Fed. 2d 412. This Court has held that the mere fact that information may be hearsay does not destroy its role in establishing probable cause. *Ker vs. California*, 374 U. S. 23; *Brinegar vs. U. S.*, 338 U. S. 160. In *Draper vs. U. S.*, 358 U. S. 307 (1959) the Court held that information from a reliable informer corroborated by the agent's observation as to the accuracy of the informer's description of the accused and of his presence at a particular place was sufficient to establish probable cause for an arrest without a warrant.

Generally police officers may detain and question persons when circumstances are such as would indicate to reasonable man in a like position that such course is necessary to proper discharge of duty. *People vs. Machel*, 44 Cal. Rpts. 126.

"Reasonable Cause" has been generally defined to be such state of facts as would lead a man of ordinary care and prudence to believe and consciously entertain an honest and strong suspicion that person is guilty of crime. *People v. Machel, supra.*

Question of probable cause to justify defendant's arrest and search must be tested on facts which records show were known to officers at time arrest was made. *People v. Machel, supra.* Also *People v. Hernandez*, 40 Cal. Repts. 100.

While *Mapp vs. Ohio*, 367 U. S. 643 (1961) does not deal with the question of "stop and frisk," the principles enunciated therein and approved in *Ker vs. California* are sufficiently analogous to provide us with answers to the present question:

> "Mapp sounded no death knell for our federalism, rather it echoed the sentiment of Elkins vs. U. S., supra, at 221, that a healthy federalism depends upon the avoidance of needless conflict between state and federal courts by itself urging that federal-state co-

operation and the solution of crime under constitutional standard will be promoted, if only by recognition of their now mutual obligation to respect the *same fundamental criteria in their approach*. 367 U. S. at 658." (the court's emphasis) 374 U. S. at 31.

"Second, Mapp did not attempt the impossible task of laying down a final formula for the application in specific cases of the constitutional prohibition against unreasonable searches and seizures; it recognized that we would be met with recurring questions of the reasonableness of searches, and that, at any rate reasonableness is in the first instance for the trial court * * * to determine, id. at 653, thus indicating that the usual weight be given to findings of trial courts." 374 U. S. at 32.

Due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from totality of circumstances that the detaining officers could have had reasonable grounds for their action, and a founded suspicion is all that is necessary, that is, some basis from which the court can determine that detention was not arbitrary or harassing. *Wilson v. Porter*, 361 Fed. 2d 412, 415.

The trial court's finding of reasonable cause is wholly consistent with the foregoing criteria. The court said:

"There was *reasonable cause* in this case for the officer Detective McFadden to approach these individuals and pat them. He approached them, and for his own protection frisked them." (Our emphasis.)

In the light of that language the trial court was doing exactly what this Court had expressed:

"federal-state cooperation in the solution of crime under standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approach."

Since the precise question had never been decided by this Court, the trial court made every effort to follow and respect fundamental criteria of due process in determining the issue. The only innovation by the trial court was that the quantum of evidence to establish probable cause for stop and frisk need not be as great as that required for arrest, search and seizure. The opinion of the trial court abounds with fundamental criteria for deciding this question:

> (1) "I am a great believer of the personal rights propounded by our Supreme Court reiterated and reaffirmed, neglected over the years, and given to us under the Fourth Amendment, and other amendments of the United States Constitution."
>
> (2) "At the same time a police officer cannot—as far as this Court is concerned—and will not be permitted to stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless there are reasonable circumstances justifying a frisk."
>
> (3) "When the circumstances justify and there is reasonable suspicion, and for his own personal protection * * * frisk to determine if there are weapons for his personal safety."
>
> (4) "* * * officer * * * assigned in the area which he had been placed, and doing the job he had been doing, had reasonable cause to believe and to suspect that the defendants were conducting themselves suspiciously and some interrogation should be made of their action."
>
> (5) "There was reasonable cause in this case for the officer to approach these individuals and pat them."

Not only did the trial court recognize its obligations and give respect to the fundamental criteria of due process in deciding this question, but it is quite evident that the Ohio Court of Appeals, as indicated by the following pas-

sages, likewise recognized their obligation and gave respect to such fundamental criteria:

> "Therefore, we hold in line with the great weight of authority that a policeman may under *appropriate circumstances*, such as exist in this case, *reasonably* inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest." (Our emphasis.)
>
> "However, we must be careful to distinguish that the "frisk" authorized herein includes only a "frisk" for a dangerous weapon. It by no means authorizes search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by requirements of the Fourth Amendment and probable cause is essential. White vs. United States (C. C. A. D. C. 1959), 271 F. 2d 829. Therefore, we hold only that on the facts presented in the instant case, the "frisk" for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts."

As to whether there was sufficient evidence which gave the officer reasonable grounds to stop, question, and frisk petitioners, respondent relies on the state of the record:

(1) Police officer on duty performing his police responsibilities.

(2) Thirty-nine years' experience.

(3) Observation of suspicious activities of petitioners and other.

(4) Concludes a stick-up is imminent.

(5) Decides to investigate and interrogate.

(6) Identifies himself as a law officer.

(7) Asked their names—receives incoherent answers.

(8) Frisked for weapon for his protection.

(9) Nature of the suspected crime—stick-up: inference of the use of a weapon and violence.

(10) The absence of assistance to the officer in relation to the number of suspects (three).

(11) The sex of the subjects—all male.

(12) The demeanor and seeming agility of the suspects and the clothing they wore, as inference of possibility of concealed weapons.

We recognize that the trial court's findings of reasonableness, as affirmed by the Ohio Court of Appeals, are respected only insofar as consistent with federal constitutional guarantees and that they are by no means insulated against examination by this Court. *Spano vs. N. Y.*, 360 U. S. 315, 316 (1959); *Thomas vs. Arizona*, 356 U. S. 390-393 (1958); *Pierre vs. Louisiana*, 306 U. S. 354, 358 (1939); *Ker vs. California*, 374 U. S. 23.

We welcome the Court's examination of the facts, in making its determinations and findings, to establish that as to reasonableness, the fundamental, i.e. constitutional, criteria laid down by this Court have been respected in every instance in the case at bar.

IV. In the case at bar the lawful "frisk" produced additional evidentiary facts giving rise to probable cause to arrest for committing a felony in the presence of the officer.

Probable cause for the arrest of petitioners, while not present at the time the officer approached these men to question them, nevertheless was present at the time of their arrest. There appears to be no question but that the trial judge, defense counsel and the prosecuting attorney are in agreement that up to the point the "frisk" produced

knowledge of the weapon probable cause for arrest did not exist.

The lawfulness of the arrest without a warrant, in turn, must be based upon probable cause, that is, where the facts and circumstances within his (the officer's) knowledge and of which he had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar vs. U. S.*, 338 U. S. 160, quoting from *Carroll vs. U. S.*, 267 U. S. 132, 162 (1925); accord *People vs. Fisher*, 49 Cal. 2d 442, 317 P. 2d 967 (1957); *Bompensiero vs. Superior Ct.*, 44 Cal. 2nd 178, 281 P. 2nd 250 (1955); *Ker vs. California*, 374 U. S. 23.

The information within the knowledge of the officer at the time he approached the petitioners clearly furnished grounds for his investigation and interrogation. Upon identifying himself as a police officer and receiving mumbled, incoherent responses, such suspicious evasion added further probable cause to the officer's previous conclusion that a stick-up was imminent. In view of the totality of the circumstances existing at that moment it was not unreasonable for the officer to come to that conclusion. Thereupon the officer took hold of one man and patted him to determine if he had any weapons before asking further questions:

> "Q. Det. McFadden, can you tell us why you turned John Terry around facing the other two men with you behind him?
>
> A. Due to my observations, the observations on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun.
>
> (R. 137) I wanted to see if they had any guns."

Had the officer frisked and found nothing there would have been no grounds for an arrest. The officer, while

frisking, through his sense of touch felt a bulge in Terry's left breast pocket, which he decided was a gun. We must at this point recall that here is an officer with 39 years' experience and training who has had countless opportunities to recognize the presence of weapons concealed under a suspect's clothing. Applying this accumulated experience to his observations of these men, the only intelligent conclusion that the experienced police officer could make was that the petitioners were at that time committing a felony in the officer's presence by carrying a concealed weapon. To this point there has been no arrest, no search. The arrest followed immediately when the men were ordered to move inside the store and place their hands against the wall. Where before there was no intent to detain, there is now; where before there was no probable cause to arrest, there is now.

The petitioners were not free to go at liberty. They were under arrest. Even though technical words "You are under arrest", were not spoken, a valid arrest had been made.

Circumstances short of probable cause to make an arrest may still justify officers stopping pedestrians or motorists on streets for questioning, and as circumstances warrant, officer may, in self protection, superficially search suspect for concealed weapons and should investigation then reveal probable cause to make an arrest, officer may arrest suspect and conduct reasonable search incidental thereto. *People vs. Machel,* 44 Cal. Rpts. 126.

To justify the seizure of a weapon which could be used against the arresting officer we shall not draw a fine line measuring the possible risks to the officer's safety. The officer should be permitted to take every reasonable precaution to safeguard his life in the process of making the arrest. *State vs. Reilly,* 402 P. 2d 741 (1965).

In *State vs. Herdman,* 130 N. W. 2d 628, the Supreme Court of Minnesota uses the following language:

> "In the argument before this court it appears to be the claim of the defendant that the evidence used against him was the product of an exploratory search without probable cause in violation of his rights under the 4th and 14th Amendments. It seems to be further urged that since Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. ed. 2d 1081, police officers are not permitted to accost a suspicious character on a public street for questioning. While the Mapp case and numerous decisions recently handed down by the United States Supreme Court clearly establish that under state and federal procedure citizens are entitled to uniform protection from unreasonable searches and seizures, we do not understand that these decisions have gone so far as to require or suggest that state police officers follow precise procedures in making arrests, searches and seizures. The Fourth Amendment protects the individual only from 'unreasonable' searches and seizures; and whether a search and seizure is 'unreasonable' must depend upon the particular facts of each case.
>
> "Nor do we feel that the legality of the arrest of defendant is tainted because the police officers accosted and interviewed defendant without actual information that he was carrying stolen property in his automobile. Under the circumstances here, the police officers did no more than what they were required to do in performance of their duties. * * *"

However convincing cases from other jurisdictions may be, this Court in cases under the Fourth Amendment has long recognized that the lawfulness of arrest by state officers for federal offenses is to be determined by references to state law insofar as it is not violative of the federal constitution. *Miller v. U. S.*, 357 U. S. 301 (1958);

U. S. v. DiRe, 332 U. S. 581 (1948); *Johnson v. U. S.*, 333 U. S. 10, 15, Note 5 (1948).

A fortiori, the lawfulness of these arrests by the officer for state offenses is to be determined by Ohio law.

Ohio Revised Code Section 2935.04 provides:

"2935.04. *When Any Person May Arrest.*

"When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

Ohio Revised Code Section 2923.01 provides in pertinent part:

"2923.01. *Carrying of Concealed Weapon.*

"No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person. This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by Sections 311.07, 737.10, 1717.06, 1721.14, and 2917.32 of the Revised Code, to go armed when on duty. * * *"

To sum up this question we again refer to our Court of Appeals Opinion:

"As a result of the valid 'frisk,' a fully loaded automatic was discovered concealed on the person of the defendant. The unauthorized possession of this weapon is a felony under Section 2923.01, Revised Code. According to the uncontradicted evidence in this case, the defendant was not arrested until after he was ordered into the store. At the moment of the arrest, the detective had reasonable grounds to believe a felony was being committed. As stated in Beck vs. Ohio, 379 U. S. 89 (1964):

'Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment, the facts and circumstances within their knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing the petitioners had committed or were committing an offense.'

"Therefore, we hold that, as the detective had validly found the gun, he had at the moment of the arrest adequate probable cause to arrest the defendant, Busby vs. United States (C. C. A. 9, 1961), 296 F. 2d 328, and that the arrest in no way violated the Fourth Amendment.

"One further point remains to be discussed concerning defendant's contention that the arrest occurred at the time of the initial questioning and therefore under the exclusionary rule of Mapp vs. Ohio, 367 U. S. 643 (1961), the evidence must be suppressed. Although we have held that the arrest in this case did not take place until the defendant was ordered into the store, we must note in passing that even if the arrest took place as defendant contends, it does not necessarily follow that this evidence must be suppressed.[31]

"The Mapp exclusionary rule was imposed upon the states not because of some command inherent in the Fourth Amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the Fourth Amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in

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[31] Some searches made a few moments before the arrest to which they were incidental have been upheld and the evidence seized admissible. *U. S. v. Devenere*, 332 F. 2d 160 (1964); *U. S. v. Boston*, 330 F. 2d 937 (1964); *Dickey v. U. S.*, 332 F. 2d 773 (1964).

mind this raison d'etre of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. A judicial rule rendering evidence produced as the result of a 'frisk' inadmissible would fail to deter the police from 'frisking' suspects believe to be armed as police 'frisk' for their own protection rather than for the purpose of looking for evidence. A rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty. The exclusionary rule of illegally obtained evidence cannot be interpreted solely to provide a tidy 'fox hunting' theory of criminal justice. The purpose of the exclusionary rule is to control police misconduct and in this context it must be applied. Traynor, 'Mapp vs. Ohio at Large In the Fifty States,' 1962 Duke Law Journal 319 (1962); Note, 50 Cornell Law Quarterly 529 (1965).

"Furthermore, even if the Supreme Court would hold that federal officers may not inquire into suspicious street activities or 'frisk' in the absence of probable cause to arrest, this does not necessarily invalidate the applicable state rules. There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts. Traynor, 'Mapp vs. Ohio at Large In the Fifty States,' Duke Law Journal (1962) 319 at 320. Local problems of law enforcement are quite different from federal problems, and the range of crimes encompassed by the states' jurisdiction creates more complicated patterns to be dealt with. The states are not precluded from developing 'workable rules' governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement provided those rules do not violate the constitutional proscriptions against unreasonable searches and the concomitant command that evidence so seized is inadmissible against one who has

> standing to complain. Ker v. California, 374 U. S. 23 (1963); Beck vs. Ohio, 379 U. S. 89 (1964). The necessities of law enforcement in large urban areas require the procedures utilized in the instant case. We agree with the District of Columbia Court of Appeals when they stated that they cannot believe that the 'Supreme Court has forbidden the police to investigate crime.' Trilling vs. United States, 260 F. (2d) 677, 700 (D. C. Cir. 1958)."

It is incorrectly argued by the petitioners that the trial court made a finding that the arrest was unlawful and that after making such a finding of illegal arrest the court should have suppressed the evidence. The fact is that the trial court never held that these men were illegally arrested in this case. The court merely said that had the arrests preceded the frisking of the men, such arrests would then have been illegal. The court then delineated the distinction between "frisking" as commonly practiced by police officers when they stop a suspect and the search of the person incident to arrest.

If we accept the law of "stop and frisk" as a benefit to society in the interest of safety and welfare, the subsequent factual situation must be looked into in the light of that law to establish whether we have a legal arrest and a search incident thereto. The facts as heretofore discussed in no way abridge the constitutional rights of the petitioners.

The petitioners contend, however, at certain points of their argument that despite a right of inquiry, the arrest took place the moment the defendant was questioned by the detective. They argue that at that time there were no adequate "reasonable grounds" to arrest and therefore under the exclusionary rule of *Mapp vs. Ohio*, 367 U. S. 643 (1961), the evidence must be suppressed. In support of this the petitioner's brief states:

"Since the police officer in this case did not conduct any interrogation of the defendant and his companions other than an inquiry of their names * * * his purpose was to arrest and not to interrogate."

A principal cause of the difficulty here is the ambiguous nature of the word "arrest" to signify the mere act of stopping or restraining a person. But the term "arrest" is more commonly used in the technical criminal law sense as the seizure of an alleged offender to answer for a crime. Note, 39 *New York University Law Review* 1093, 1096 (1964); *Commonwealth vs. Lehan*, 347 Mass. 197 (1964). The cases decided by the United States Supreme Court appear to have adopted this later usage, see *Carroll vs. United States*, 267 U. S. 132, 136 (1925); *Brinegar vs. United States*, 338 U. S. 160, 163 (1949), and it is the usage that has been adopted by the courts of Ohio. In 5 *Ohio Jurisprudence* (2d), Arrest, Sec. 3, p. 19, "arrest" is defined as follows:

"An arrest as the term is used in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime."

Similarly, in *State vs. Milam*, 108 Ohio App. 254, 268 (1959), the court quoted with approval the following definition of arrest:

"To constitute an 'arrest', four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested."

It is readily apparent that a required element of an arrest is the intent of the officer to arrest. *United States vs. Bonanno*, 180 F. Supp. 71 at 81-83. In the instant

case, when the detective approached the defendant, he had, as shown by uncontradicted testimony, no intention at all to arrest, but only to inquire as to the defendant's activities. As stated in the record:

> "Q. You observed these men for some ten to twelve minutes?
>
> A. That's right.
>
> Q. You observed the mode of conduct that you have described to us?
>
> A. That's right.
>
> Q. Did you, sir, as a police officer consider that you should investigate it?
>
> A. I did.
>
> * * *
>
> Q. * * * after they left the corner and you observed them again in front of * * * (the store where the three men met) * * * what did you do?
>
> A. I stopped them and went over and talked to them."

As to the exact time when the arrest took place, the record shows:

> "Q. Then in this situation you considered them to be under arrest when you ordered the store people to call for the wagon?
>
> A. That's right."

It is argued on behalf of the petitioners that the case of *Henry vs. United States*, 361 U. S. 98 (1959) establishes the point that the arrest in the instant case took place the moment the defendant was stopped by the detective. However, in the *Henry* case, the government conceded in the lower courts, see 259 F. (2d) 725 (7th Cir. 1958), and adhered to the concession before the Supreme Court, that the "arrest" occurred the moment the car in which Henry was riding was stopped by the federal agents. The Court stated:

"The prosecution conceded below, and adheres to that concession here, that the arrest took place when the federal agents stopped the car. This is our view of the facts of this particular case." 361 U. S. at 103.

When the opinion in *Henry* is read in light of this concession, it is apparent that the Court was only deciding that, in the circumstances of that case, there was no probable cause to justify an "arrest" at the time the car in which Henry was riding was stopped. See, *United States vs. Bonanno*, 180 F. Supp. 71 at p. 85; *Busby vs. United States*, 296 F. 2d 328.

Therefore, the Court of Appeals held in the instant case, that the actual arrest did not occur until the defendant was ordered into the store after the loaded gun was discovered concealed on his person; Cf. *Rios vs. United States*, 364 U. S. 253 (1960).

Section 2935.01 of the Ohio Revised Code defines arrest:

"To deprive a person of his liberty by legal authority. The seizing of a person and detaining him in the custody of the law."

V. In the instant case there was a lawful arrest without a warrant for the commission of a felony and a legal search incident to the arrest; therefore evidence obtained in such search was admissible at the trial.

Since there was a lawful arrest, the sole point remaining concerns the lawfulness of the search and admissibility of the evidence seized. The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officer had no search warrant. The search most commonly made by law enforcement officers, and the subject of the petitioner's complaint

herein, is that of the person of the accused whom the officer had arrested. Searches of the person must conform to federal constitutional standards. The Fourth Amendment provides in part "* * * that the right of the people to be secure in their person, house, papers and effects against unreasonable searches and seizures shall not be violated * * *."

The vast majority of searches of the person are made incidental to lawful arrest. English and American law has always recognized the right on the part of the government to search the person of the accused when legally arrested. *Weeks vs. U. S.*, 232 U. S. 383, 392 (1914); *Abel vs. U. S.*, 362 U. S. 217 (1960).

The law on this subject has long been so well settled that it is useless to do more than state it whenever the occasion arises. *Lefkowitz vs. U. S. Atty.*, 52 Fed. 2d 52 (1931), affirmed 285 U. S. 452.

The right to search applies to arrests for misdemeanors as well as to those for felonies, *U. S. vs. Schned*, 278 Fed. 650 (1922); *Davis vs. U. S.*, 328 U. S. 582 (1946), assuming an arrest in the full sense of the term.

The legal basis of the right to search is given by law to the arresting officer for three reasons:

(1) To protect the officer against harm;

(2) to deprive the prisoner of potential means of escape; and

(3) to prevent destruction of evidence by the arrested person.

Mr. Justice Frankfurter, dissenting in *U. S. v. Rabinowitz*, 339 U. S. 56 (1950); *Abel v. U. S.*, 362 U. S. 217 at 236.

If the arrest of the person is unlawful, any subsequent search made incidental to arrest is unreasonable. *U. S. v.*

DiRe, 332 U. S. 581 (1948); *Brandon v. U. S.*, 270 F. 2d 311 (1959), Note 5, cert. den. 362 U. S. 943; *Bynus v. U. S.*, 262 U. S. 465; *Williams v. U. S.*, 237 F. 2d 789 (1956).

No matter how valid the arrest may be in a technical sense, if the court finds that it was used by the officers simply as a pretext to make a search of the person, the search is unreasonable. *Taglavore v. U. S.*, 291 F. 2d 262 (1961). "An arrest may not be used as a pretext to search for evidence." *U. S. v. Lefkowitz*, 285 U. S. 452 (1932).

The search of the person, incidental to arrest, should be made by one or more of the arresting officers. *U. S. v. Grieco*, 25 F. R. D. 58 (1960).

The officer's right to make a search of the person incidental to arrest being predicated upon the arrest, the search must follow the arrest, not precede it. *White v. U. S.*, 271 F. 2d 829 (1959); *U. S. v. Hamn*, 163 F. Supp. 4 (1958).

At this point the distinction made by the trial court and the appellate court comes into focus. The foregoing rule in the *White* and *Hamn* cases and the decision in the *Mapp* case will not outlaw a state officer's frisking or even a search of the person made prior to arrest. Under the Uniform Arrest Act, adopted with modifications in Delaware, New Hampshire and Rhode Island, "a peace officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in Section 2, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person." "The Uniform Arrest Act," 28 *Virginia Law Review* 315 at 344 (1942).

The law in the case at bar as pronounced in the opinion of the Ohio Court of Appeals is so well founded that, in a case involving almost identical facts, the Supreme Court of New Jersey has quoted and cited with approval that opinion. *State v. Dilley,* 49 N. J. 460, 231 A. 2d 353. (September 1967.)

The proposition that evidence seized as a result of a lawful arrest followed by a legal search of the person is so axiomatic that it requires no further argument here.

CONCLUSION.

It was stated by Mr. Justice Holmes in "The Common Law and Collected Legal Papers":

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal to do with the syllogism in determining the rules by which men should be governed."

Recognition must be given to the fact that in our changing society conditions and circumstances vary; that logic, experience, necessity, prevailing moral and political theories, public policy and prejudices all reflect and determine the rules under which we as men live. But these are not the only elements to which recognition must be given in formulating such rules.

The realities of our currently changing society require the addition of another ingredient—perhaps the most essential one—*the deadly realism of crime.* We should therefore take note of the experiences of those who have been confronted with this deadly reality to the end that our steps will be toward that road on which the guideposts

will be directed to insuring the safety and welfare of the personnel to whom our own safety and welfare are entrusted.

While this brief is in preparation, October 12, 1967, we are confronted with a classic example of the deadly realism of crime. Through the news media we are informed that an automobile containing four men was involved in several holdups. The state highway patrol received a description of the automobile. The officers pursued a car matching the description and brought it to a halt. A patrolman dismounted from his car to investigate and interrogate the occupants. As he approached their automobile he was met with a bullet. Except for the fact that an item of his equipment (a belt) deflected the bullet, this officer would have been killed. Such experience involving public safety should be far more convincing as to the deadly realism of crime than any logic respondent could present. Experience and necessity, as illustrated by this incident, demonstrate that the right to stop and frisk is essential for the welfare of the officer and the protection of the public. Experience and necessity should of themselves dictate affirmance of the judgment in this case.

Thus we urge that due recognition of safety, experience, necessity and considerations of public policy and the deadly realism of crime merit affirmance of this decision to the end that the maximum safety and security be afforded to those to whom are entrusted the protection of the well-being of society. To those who have beat the drums of fear that the framework of the constitutional safeguards will collapse and we will move several steps forward to a police state if this case is affirmed, we reply in the words of Judge Lewis of the United States Court of Appeals, Tenth Circuit, in *Anspach v. U. S.*, 305 F. 2d 48 (1962):

"But the prevention and detection of crime is not a polite business and we see no need or justification for reading into the fourth amendment a standard of conduct for law enforcement officials which would leave society at the mercy of those dedicated to the destruction of the very freedoms guaranteed by the Constitution. The 'pursuit of happiness' referred to by Justice Brandeis in Olmstead can be destroyed by idealistic theory that shuns the deadly realism of crime."

Even though this case merits affirmance on the basis of any one of the elements that determine the law—changing conditions and circumstances, necessity, moral and political theories, public policy, prejudice, the deadly realism of crime—in the end the decision rests on the sum total of these elements. The affirmance of the law in this case is logically and fundamentally fair when equated with the deadly realism of crime. In the face of this deadly reality, affirmance on the basis of the sum total of these elements results in a benefit to society and is not arbitrary or capricious.

"The judicial approach to the problem, of course, must be in a spirit of cooperation with the police officials in the administration of justice. They are directly charged with the responsibility for the maintenance of law and order and are under the same obligation as the judicial arm to discharge their duties in a manner consistent with the Constitution and statutes. The prevention and punishment of crime is a difficult and dangerous task, for the most part performed by security and prosecuting personnel in a spirit of public service to the community. Only by the maintenance of law and order may the rights of the criminal and the law-abiding elements of the population be protected." Mr. Justice Reed dissenting in *Upshaw v. U. S.*, 335 U. S. 410 (1948).

Thus we conclude our case by urging that if the rules that we as men live under are to stand and to meet the test of the deadly realism of crime, the decision of the Ohio Court of Appeals should be affirmed.

Respectfully submitted,

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